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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-[illegible]

MILGO ELECTRONIC CORPORATION and INTERNATIONAL COMMUNICATIONS CORPORATION, *Petitioners*,

v.

WESTERN ELECTRIC COMPANY, INC. and AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

STATEMENT OF RESPONDENTS IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

In respondents' judgment, this case presents only one question worthy of consideration by this Court. That question, properly stated, is:

> Whether antitrust liability can be imposed for the enforcement by a telecommunications common carrier of tariffs which have been the subject of active and pervasive regulation by the Federal Communications Commission.

COUNTER-STATEMENT OF THE CASE

This case, the bulk of which is still pending in the district court, was initiated by a complaint filed on behalf of respondent Western Electric Company, Inc. ("Western Electric"), the manufacturing arm of the Bell System, charging petitioners Milgo Electronic Corporation and International Communications Corporation ("Milgo") with infringing certain data modem patents. Milgo filed a counterclaim in which it alleged, among other things, that the tariffs of the Bell System companies setting forth the terms and conditions for the interconnection of customer-provided data modems —specifically, the requirement that such modems be connected to the nationwide telecommunications network only through a data access arrangement (DAA) —were unlawful under the antitrust laws.[1]

The petition for writ of certiorari filed by Milgo arises out of the decision of the district court granting in part a motion by Western Electric for summary judgment on Milgo's counterclaim by striking those paragraphs of the counterclaim attacking the Bell System's interconnection tariffs (App. 16). The ground of that decision was succinctly summarized by the Court of Appeals as follows (App. 5-6):

> "The district court based its order on the doctrine of implied repeal, *see, e.g., Gordon* v. *New York Stock Exchange,* 422 U.S. 659, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1973), *U.S.* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975), finding in particular that the antitrust laws were impliedly repealed in this area because of pervasive regulation by the FCC."

[1] This counterclaim is the only pleading properly involved in Milgo's petition. Although Milgo filed a third-party complaint against Western's parent, American Telephone and Telegraph Company ("AT&T"), and although Milgo's petition for certiorari names AT&T as a respondent, the district court has taken no action on Milgo's third-party complaint against AT&T.

Despite the fact that the district court refused Milgo's request to certify this order for immediate interlocutory review under 28 U.S.C. § 1292(b), Milgo filed an appeal with the Court of Appeals for the Fifth Circuit and requested, in the alternative, review under the All Writs Act (28 U.S.C. § 1651). On March 6, 1978, the Court of Appeals dismissed Milgo's appeal, holding that the order of the district court was not appealable (App. 6-12), and declined to provide review under the All Writs Act (App. 12). On May 19, 1978, the Court of Appeals denied Milgo's petition for rehearing and rehearing en banc (App. 1-3).

RESPONSE TO PETITIONERS' REASONS FOR GRANTING THE WRIT

Milgo advances two grounds in support of the issuance of a writ of certiorari in this case. The first—that Milgo might possibly be foreclosed from a jury trial on certain aspects of its antitrust counterclaim—is wholly lacking in merit for the reasons set forth in the opinion of the Court of Appeals denying Milgo's petition for rehearing (App. 1-3) and requires no further discussion.[2] The second—that the holding of the district court,

[2] In addition to the elaborate hypothetical sequence of possible events upon which Milgo's jury trial argument is based, Milgo has expressed doubt as to whether it will actually seek a jury trial. Thus, Milgo carefully hedged its jury trial argument in the Court of Appeals, stating that it "might at a later time decide to waive its right to a trial by jury in order to have the issue of patent misuse heard first by the court" (Milgo Brief on Appellate Jurisdiction, p. 13).

that the Bell System's enforcement of its interconnection tariffs is immune from antitrust attack, is in conflict with the decisions of this Court—is also without merit. Nonetheless, respondents do not oppose the issuance of a writ of certiorari on the antitrust immunity question for the reasons set out below.

The antitrust immunity issue is of great importance both to the telecommunications industry and to the public. The instant case is one of at least twenty antitrust cases instituted during the past several years attacking the same tariff. In each of these cases, the contention is advanced that the conduct of the telephone company in the enforcement of its tariffs must be judged as if it were operating in an environment of free and unfettered competition as envisoned by the antitrust laws. On the other hand, Title II of the Communications Act of 1934, which governs the specific conduct involved in these cases, is premised upon the assumption that telecommunications common carriers will follow a public interest standard—not a competition standard—in the activities in which they engage subject to pervasive regulatory supervision. Consequently, antitrust immunity is necessitated. *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), and *United States* v. *National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694 (1975). Nevertheless, the uncertainty generated by the threat of imposition of conflicting standards and the pendency of this tide of litigation is debilitating to the telecommunications industry. In similar circumstances, this Court has exercised its discretion to review antitrust immunity issues of precisely the kind involved here. See, *e.g.*, *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975). It should adopt that same course here.

Review by this Court of the fundamental jurisdictional issue presented here is also justified by considerations of judicial economy. The numerous antitrust cases pending against the Bell System companies and the repetitive consideration of issues identical or similar to the issue presented by the petition here are consuming enormous judicial resources. If, as respondents believe, the issues presented in all, or virtually all, of these cases are beyond the proper jurisdiction of an antitrust court, these judicial efforts are simply being wasted. Even if respondents are wrong and some or all of the complaints involved are within the proper jurisdiction of an antitrust court, the judicial resources being expended on resolution of this jurisdiction issue are being wasted. In either event, considerations of judicial economy strongly suggest that this Court should hear and definitively resolve the jurisdictional issue presented in the petition. See *Schlagenhauf* v. *Holder*, 379 U.S. 104, 111-12 (1964); *Far East Conf.* v. *United States*, 342 U.S. 571, 572 (1952).[3]

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[3] On January 6, 1977, and again on September 8, 1977, respondents Western Electric, AT&T and other Bell System companies filed petitions for certiorari in this Court in an effort to obtain review of the preliminary jurisdictional ruling of the district court in *United States* v. *American Tel. & Tel. Co.*, 427 F. Supp. 57 (D.D.C. 1976), in which Judge Waddy determined that a complaint attacking the conduct of the Bell System in virtually every facet of the telecommunications industry could not be summarily dismissed at the outset of the litigation for lack of jurisdiction, because he concluded that he must have "antitrust jurisdiction of at least some of the aspects of the case" (*id.* at 61). Those petitions were denied. 429 U.S. 1071 (Jan. 25, 1977); 434 U.S. 977 (Nov. 28, 1977). In an opinion issued on September 11, 1978, Judge Greene, who replaced Judge Waddy on the case, reconsidered the issue and again concluded that the court has antitrust jurisdiction. The instant case differs because, unlike the broad and indefinite character of the charges involved in the Government case, this case presents for review a narrow and precise question definitively resolved by the district court.

Lack of judicial unanimity portends that this Court will inevitably be called upon to determine the antitrust immunity issue. The decision of the district court in this case is one of six lower court decisions specifically holding that enforcement of the tariffed terms and conditions for the interconnection of customer-provided terminal equipment is immune from the antitrust laws under the principles established by this Court. In *Monitor Business Machines, Inc.* v. *American Tel. & Tel. Co.*, 1978-1 Trade Cases ¶ 62,030 (C.D. Cal. 1978), for example, the court held that (*id.* at 74,445):

> "The situation in this case is analogous to that in *Gordon* and *N.A.S.D.* The regulatory control of customer-provided interconnection devices by the F.C.C. under the public interest is incompatible with concurrent regulation under the antitrust laws."

Accord Phonetele, Inc. v. *American Tel. & Tel. Co.*, 435 F. Supp. 207 (C.D. Cal. 1977), *appeal docketed*, No. 77-3877 (9th Cir.); *Essential Communication Systems, Inc.* v. *American Tel. & Tel. Co.*, 446 F. Supp. 1090 (D.N.J. 1978); *DASA Corp.* v. *General Telephone Co.*, 1977-2 Trade Cases ¶ 61,610 (C.D. Cal. 1977), *appeal docketed*, No. 77-2936 (9th Cir.); and *Selectron, Inc.* v. *Pacific Northwest Bell Tel. Co.*, Civil No. 76-965-BE (D. Ore. June 19, 1978).

On the other hand, in *Jarvis, Inc.* v. *American Tel. & Tel. Co.*, Civil Action No. 74-1698 (D.D.C. August 7, 1978), the court denied a motion to dismiss an antitrust complaint attacking the same interconnection tariffs, holding that dismissal of these claims could not be justified, because the specific provisions of those tariffs had been initially filed by the carrier. And in *United States* v. *American Tel. & Tel. Co.*, Civil Action No. 74-1698 (D.D.C. September 11, 1978), the court has recently held that none of the Bell System's tariff activities are protected from the Sherman Act by FCC regulation (see note 3 *supra*). Respondents believe that the decisions in *Jarvis* and the Government case are erroneous.[4] However, it may be several years before those decisions are reviewed on appeal. In the meantime, those decisions threaten to cause misapplication of this Court's opinions on the question of implied antitrust immunity in many other pending antitrust cases attacking the enforcement of Bell System tariffs.[5]

[4] On August 17, 1978, the defendants in *Jarvis* filed a motion to certify the court's order of August 7, 1978, for immediate appellate review under 28 U.S.C. § 1292(b). That motion has not yet been ruled upon by the court.

[5] See, *e.g.*, *Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, Civil Action No. B 75 319 (D. Conn.); *Sound, Inc.* v. *American Tel. & Tel. Co.*, Civil Action No. 76-186-2 (S.D. Ia.); and *Interconnect Planning Corp.* v. *American Tel. & Tel. Co.*, Civil Action No. 77-1584 (RO) (S.D.N.Y.), in each of which a motion to dismiss on the precise ground involved in this case is pending decision.

CONCLUSION

Notwithstanding the fact that the decision below is in complete accord with this Court's decisions, there will be no surcease of litigation on the antitrust immunity issue until it is definitively resolved by this Court. Respondents therefore do not oppose the issuance of a writ of certiorari to review the decision below.

Respectfully submitted,

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